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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
Rate Regulation	)	

To: The Commission

OPPOSITION TO PETITION FOR RECONSIDERATION AND CLARIFICATION

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its Opposition to the Petition for Reconsideration and Clarification ("Petition") filed on May 16, 1994 by the National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors, the National Association of Counties, and the City of New York (hereinafter "Local Governments") in the above-captioned proceeding.[1]

INTRODUCTION

Throughout this proceeding, local franchising authorities have sought to unreasonably constrain the ability of cable operators to recover the costs they incur as a result of franchising requirements. Local Governments have similarly sought to avoid public accountability for imposing these costs on cable operators by seeking to prevent operators from itemizing the full extent of these costs on subscriber bills. Their most recent Petition is merely a continuation of these efforts. Specifically, Local Governments seek (1) a narrow definition of franchise-imposed costs that may be treated as "external" to the price cap; (2) a Commission ruling that operators

[1] 59 Fed. Reg. 28386 (June 1, 1994).

not be allowed to advertise on a "fee plus" basis where a range of franchise fees is identified in the advertisement; (3) modification of permissible itemization of PEG costs; and (4) reconsideration of the flexibility the Commission permitted operators with respect to the payment to them of franchise fee overcharges. For the reasons stated below, the Commission should deny the Petition.

A. The FCC Should Not Reconsider its Decision to Allow External Treatment of Franchise-Related Costs

FCC rules permit cable operators to "pass through" as external costs, among other things, the "costs of complying with franchise requirements, including costs of providing public, educational, and governmental access channels as required by franchising authorities."[2] Claiming that this definition is too vague, the Local Governments seek to manufacture an entirely new test -- and adopt a definition that could gut the pass-through rule.[3] At this stage in the proceeding, it is far too late to seek yet again to reopen the issue of whether franchise-required costs should be treated as external. Local Governments' belated efforts to narrow, if not eviscerate, external cost treatment for these expenditures should again be rejected by the Commission.

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[2] 47 C.F.R. § 76.922(d)(3).

[3] Local Governments suggest that the Commission define "franchise-related costs" to

> (a) include only new or additional direct monetary costs specifically enumerated by a stated dollar amount in a franchise agreement to satisfy franchise requirements imposed by the franchising authority, or specifically attributable to a specific new or additional franchise requirement imposed by the franchising authority, but (b) do not include: (i) normal types of business costs other companies incur in doing business with a jurisdiction; (ii) costs of keeping pace with current technological developments in the cable industry; or (iii) costs of remaining competitive in the marketplace.

Petition at 6.

Local Governments' proposal to exclude virtually all franchise-imposed costs by labeling them "normal types of business costs," "costs of keeping pace with current technological developments," or "costs of remaining competitive" is entirely inconsistent with the Commission's explanation of the pass through. This is merely a repackaged version of Local Governments' prior contention that franchise-imposed costs are really "voluntary" expenditures and should not be passed through.[4]

When franchising authorities last pressed this narrow view of permissible franchise cost pass throughs, the FCC disagreed. In its First Order on Reconsideration, issued last August, the Commission decided that the statutory command that it take into account franchise requirements should be

> interpreted in a way that will provide equitable results for operators and subscribers. We believe this objective will be met by providing that only increases in the costs of complying with the services specifically required in the franchise documents will be eligible for external treatment. This will permit local authorities and individual systems to work cooperatively to establish the costs of meeting franchise requirements that will be afforded external treatment. If specifically required by franchising authorities, however, we believe that costs of meeting such requirements should be accorded external treatment.[5]

The Commission also explained that while cost increases caused by complying with the FCC's recently-adopted customer service or technical standards would not be treated as external costs, meeting franchise-imposed technical and customer service standards in excess of the federal rules would be.[6] What is and should remain relevant to a determination of whether certain costs

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4 See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, First Order on Reconsideration MM Docket No. 92-266 at ¶ 99 (hereinafter "First Order on Reconsideration").

5 Id. at ¶ 102.

6 Id.

are external is whether the services are specifically required in a franchise and whether costs for providing those services have increased.

Franchising authorities also propose that the FCC require operators to spread franchise-related costs evenly throughout the franchise term.[7] Again, the cities raised this issue before and the Commission did not adopt it.[8] If the franchise requires an operator to incur costs all at once, there is no reason to force operators to spread its legitimate recovery of those costs over the franchise period.

In short, it is patently unfair to require an operator to undergo the time and expense of a cost-of-service hearing in order to recover increased costs imposed by a city through a franchise requirement. This is particularly true since failure to make the required expenditures may put an operator's franchise at risk. The public interest will not be served by allowing local governments to impose costs "largely beyond the control of the cable operator,"[9] and then deny operators any ready means for recovery.

B. Advertisement of Franchise Fees

In its Third Order on Reconsideration, the Commission permitted operators who serve multiple franchise areas to advertise on a "fee plus" basis.[10] As an example, the Third Order on Reconsideration explained that an operator would be permitted to advertise that "basic service is

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7 Petition at 6.

8 See First Order on Reconsideration at ¶ 99 n.168. ("[N]ATOA argues that, in order to prevent operators from overestimating their costs, operators should be required to spread the costs of satisfying franchise requirements over the franchise term.")

9 Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order, 8 FCC Rcd. 5631, 5790 (1993) (hereinafter "Report and Order").

10 Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation Third Order on Reconsideration, at ¶ 143 (released Mar. 30, 1994) (hereinafter "Third Order on Reconsideration").

$14.00 per month plus a franchise fee of 28¢ to 70¢."[11] Local Governments do not challenge the advertisement of a range of rates, but strenuously object to an operator's ability to even mention that a separate franchise fee of some specified amount is added on to the basic service rate. They argue that cable operators should not be allowed to separately list the charge for the franchise fee because it "violates the intent of [Section 622(c)], and would be inconsistent with the Commission's own subscriber bill itemization regulation. . . ."[12] And they claim that the Commission's example improperly suggests that franchising authorities cannot collect a franchise fee calculated on the gross revenues of the operator (including the franchise fee itself). Neither of these contentions is correct.

As an initial matter, Section 622(c) permits cable operators to identify, "as a separate line item on each regular bill of each subscriber,...the amount of the total bill assessed as a franchise fee and the identity of the franchising authority to which the fee is paid."[13] In adopting rules implementing this section, the FCC recognized that Section 622(c) was designed to "increase political accountability for regulatory costs imposed, by permitting subscribers to be informed that a portion of their bills are related to governmentally imposed obligations."[14] Permitting operators to provide "fee plus" advertising is entirely consistent with the purpose of this provision.

Local Governments nonetheless contend that separately identifying a franchise fee in advertising is contrary to the manner in which franchise fees may be itemized on bills under the FCC's rules.[15] They point out that the FCC expressed concern in adopting its rules that listing

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[11] Id.

[12] Petition at 8.

[13] 47 U.S.C. § 622(c).

[14] Report and Order, 8 FCC Rcd. at 5967.

[15] Petition at 9.

itemized costs "'below the line' would tend to confuse subscribers regarding what is or is not part of the bill."[16] But advertising on a fee plus basis would hardly confuse subscribers about what amount to pay to cable operators for their total monthly bill. Indeed, it is difficult to conjure up any reason why Local Governments object to this provision other than merely as a continuation of their effort to keep cable subscribers in the dark as to what portion of their bill is attributable to the fees paid to the local franchising authority. Local Governments' interpretation of the Congressional mandate is anti-consumer, avoids the political accountability that Congress intended, and should not be adopted.[17]

C. The Commission Should Not Modify Its Treatment of Itemization of PEG Costs

For the second time, Local Governments urge that the Commission narrowly circumscribe an operator's ability to itemize on bills costs arising under a franchise agreement for institutional networks, free wiring of public buildings, provision of special municipal video services and voice and data transmissions.[18] Local Governments previously tried to keep these

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[16] Petition at 10 (quoting Report and Order, 8 FCC Rcd. at 5972).

[17] As far as Local Governments' concerns regarding how franchise fees should be calculated, that is not the subject of Section 622(c) or the Commission's rules, which "affects the format, not the content of subscriber bills." Report and Order, 8 FCC Rcd. at 5972. In any event the calculations that operators perform under either the Forms 393 or 1200 methodology yields an operator's maximum permitted rate exclusive of franchise fees. See FCC Form 1200 at 26, Module K ("Franchise fees have been excluded from this analysis in order to compare your monthly rate for the basic tier to the maximum permitted level.") Regardless of how franchise fees are calculated, operators are still entitled to charge their maximum permitted rate, plus franchise fee (on whatever revenues they are calculated), to subscribers.

Under Local Governments' example, the basic rate would be $14.70, with a 5 percent franchise fee of 73.5¢. Their calculation would lead to an operator retaining $13.96 -- 4¢ less than it is permitted to charge under the rules. Local Governments' calculation -- in which an operator would be entitled to keep less than $14 -- is plainly incorrect.

[18] Petition at 13.

costs from public view by claiming they were not "franchise fees" under Section 622(g)'s definition and could not be itemized under Section 622(c)(1).[19] The FCC, however, found that even if these costs do not fall within the definition of "franchise fees," they "are properly classified as PEG-related and are therefore itemizable under the Section 622(c)(2)."[20] Local Governments now argue that "such activities are not related, or not necessarily related, to the provision of [PEG] channels" and therefore may not be itemized.[21] But Local Governments present no support for their assertion that costs incurred for these governmental uses of cable channel capacity should not be considered "use" or "support" of governmental channels -- other than to claim that providing free service to a government building in a case where no PEG channels exist should not fall under this category.

Local Governments do not present any evidence to refute the FCC's conclusion that I-Nets, municipal video channels, and governmental voice and data transmissions can constitute channels used by the government.[22] And it may just as well be the case that public buildings are wired to support use by the government of PEG access facilities. Under these circumstances, the Commission should not engage in the hair splitting urged by Local Governments. As described above, Section 622(c) was designed to increase political accountability for costs imposed on cable operators. Given that intent, there is simply no reason to adopt the unduly crabbed view of itemization advanced yet again by the cities. The Commission should adhere to its view that these costs may be itemized.

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[19] See Third Order on Reconsideration, at ¶ 144.

[20] Id.

[21] Petition at 13 (emphasis added).

[22] See, e.g., 47 U.S.C. § 611(b) (describing that channel capacity on institutional networks may "be designated for educational or governmental use. . . .")

D. The Commission Should Adhere to its Ruling that Cable Operators May Require Lump Sum Refunds of Franchise Fees

Local Governments object to the Commission's determination that cable operators may require franchising authorities to return franchise fee overcharges either in an immediate lump sum payment, or through deductions from future franchise fee payments.[23] They argue that franchising authorities, not operators, should choose between these alternatives. The Commission should reject this proposed modification to its rules.

Local Governments argue that the Commission should not let private entities order a governmental entity to take certain actions, and that these rules are inconsistent with the rules giving operators discretion to determine the method by which refunds are returned to subscribers. These arguments are entirely specious.

First, it is not a "private entity" but the federal government that has established these rules. And second, the general rule is that operators must provide a one-time credit on prospective bills to account for overcharges.[24] Once operators have given full refunds or credits to subscribers, it is only fair that operators have the choice of immediately obtaining an up front, lump sum repayment of franchise fee overpayments from their franchising authority.

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[23] 47 C.F.R. § 76.942(f), Petition at 15.

[24] Report and Order, 8 FCC Rcd. at 5867.

CONCLUSION

For the foregoing reasons, the Commission should deny Local Governments' Petition for Reconsideration and Clarification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Leslie D. Heath, do hereby certify that on this 16th day of June, 1994, copies of the foregoing "Opposition To Petition For Reconsideration And Clarification" were delivered by first-class, postage pre-paid mail to the following parties:

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